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ARBITRATION INSTITUTE OF THE

STOCKHOLM CHAMBER OF COMMERCE

In the Matter of

TRIODOS SICAV II,

Claimant

v.

THE KINGDOM OF SPAIN,

Respondent

REQUEST FOR ARBITRATION

December 21, 2017

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1. Triodos SICAV II, on behalf of its sub-fund Triodos Renewables Europe Fund (**"TREF"** or **"Claimant**"), hereby requests the initiation of an arbitration proceeding against the Kingdom of Spain ("**Spain**" or "**Respondent**") under the Energy Charter Treaty ("**ECT**" or "**Treaty**").[1]

I. PARTIES TO THE DISPUTE

2. Claimant is an open-ended investment fund duly formed under the laws of the Grand Duchy of Luxembourg and listed in the Luxembourg Commercial Register under registration number B115771.[2] It is filing this arbitration on behalf of one of three sub-funds, TREF, whose identification number in the Luxembourg Financial Sector Supervisory Commission is 4213-01. Its corporate address is:

11–13 Boulevard de la Foire
1528 Luxembourg

VAT Number: LU 22444374

3. Claimant is represented in this proceeding by King & Spalding and Gómez-Acebo & Pombo.[3] All correspondence and communications with Claimant should be directed to Claimant's counsel as follows:

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[1] *See* Energy Charter Treaty and Related Documents, Jan. 15, 2016 ("**ECT**"), Claimant's Exhibit ("**C-**") 1.

[2] *See* Registration Certificate in the Luxembourg Commercial Register, Oct. 6, 2017, C-2.

[3] *See* Claimant's Powers of Attorney to King & Spalding and Gómez-Acebo & Pombo, C-3.

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4. The Respondent is the Kingdom of Spain. The governmental authority likely to represent Spain in this proceeding is the *Abogacía General del Estado* (Attorney General's Office) of the Ministry of Justice, which is located at the following address:

Calle San Bernardo, 45
28015 Madrid
Spain

II. BRIEF SUMMARY OF THE LEGAL DISPUTE

A. Claimant's Investments in Spain

5. TREF owns significant interests in five photovoltaic projects in Spain. The PV plants comprising four of those projects benefited from Spain's tariff guarantees under Royal Decree 661/2007 ("**RD 661/2007**"),[4] while the fifth project benefited from Spain's tariff guarantees under RD 661/2007 as amended by Royal Decree 1578/2008 ("**RD 1578/2008**").[5]

6. Through Generación Solar Investment S.L., TREF owns a 51% interest in "**Project GSI**." Project GSI consists of eight PV plants with capacities ranging from 60 to 600 kW, for a total capacity of approximately 1.25 MW. These plants entered into operation in May 2008 and were registered in the Administrative Registry of Production Facilities in the Special Regime (or "RAIPRE" by its Spanish acronym) entitling them to benefit from RD 661/2007.

7. TREF also owns "**Project Aznalcollar**" through its 50% ownership interest in nineteen project companies, called Mysolar Proyectos 1–9 and 11–20 S.L. Aznalcollar consists of eighteen 100 kW PV plants and one 90 kW PV plant, for a total installed capacity

[4] Royal Decree 661/2007, of May 25, regulating the electricity generation activity under the special regime.

[5] Royal Decree 1578/2008, of September 26, on the remuneration of electricity generation by means of photovoltaic solar technology for facilities after the deadline for maintaining the remuneration provided under Royal Decree 661/2007, for such technology.

of approximately 1.9 MW. The plants received their definitive registrations in the RAIPRE on July 8, 2008, qualifying them for the RD 661/2007 tariff and all associated rights.

8. Further, through its ownership interest in twenty project companies called Plantas Fotovoltaicas Los Cabezos I–XX S.L., TREF also owns a 50% interest in "**Project Los Cabezos**." Los Cabezos is comprised of twenty PV plants with capacities ranging between 40 and 100 kW, for an aggregate capacity of approximately 1.85 MW. The Los Cabezos plants entered into operation and were duly registered in the RAIPRE on September 9, 2008, entitling them to benefit from RD 661/2007 and all associated rights.

9. TREF also owns a 50% interest in "**Project Lucentum**," which is comprised of thirty 100 kW PV plants, for a total capacity of 3.0 MW. It owns this interest through the Spanish company Lucentum Energia S.L. The facilities received their definitive registrations in the RAIPRE on September 24, 2008, entitling the plans to qualify for the rights in RD 661/2007.

10. Last, TREF fully owns "**Project El Carpio**" in Spain through its project company Carpio Fotovoltaica S.L.U. The project has a capacity of approximately 3.5 MW. It entered into operation in February 2011 and received its definitive registration in the RAIPRE on March 9, 2011, qualifying the project for the RD 1578/2008 tariff and all associated rights.

B. Spain Implemented RD 661/2007 and RD 1578/2008 to Induce Investments in Renewable Energy

11. The production of electricity from renewable energy sources has long been an important policy in Spain. The European Union and numerous other states share these policy interests, and promotion of investment in the renewable energy sector has been embodied in international agreements such as the United Nations Framework Convention on Climate Change.

12. Policies to promote renewable energy investments are generally based on the understanding that the production of electricity from conventional resources such as coal and oil relies on limited resources and imposes substantial externalized costs on society through pollution and contribution to climate change. In contrast, renewable energy produced by sources such as photovoltaic plants generally avoid these negative externalities.

13. Because the cost of producing electricity from renewable resources is substantially higher than the cost of producing electricity from fossil fuels, however, encouraging private investment in renewable energy projects requires financial incentives to make the industry competitive. Consequently, for more than two decades, Spain has enacted various incentive schemes to promote investment in its renewable energy sector, both to satisfy international commitments regarding environmental protection and to reduce its dependence on nonrenewable energy sources.

14. Starting in 1994, Spain enacted several legislative schemes to encourage investments in renewable energy, although its early programs were insufficient to achieve the results that Spain needed to meet its domestic and international policy goals. The first regime that Spain implemented, through Royal Decree 2366/1994, contained financial incentives for electricity generated from renewable sources.[6] That legislation, however, contained no stability clause or fixed duration and thus was not successful in attracting significant new investment in the sector.

15. In 1997, Spain enacted a new law on electricity, Law 54/1997, which liberalized the electricity generation sector and established a general framework for the "special regime" governing electricity generating facilities from renewable, cogeneration, and waste sources.[7] To meet its international commitments and domestic policy goals, Spain still needed a significant influx of private investment in facilities covered by the special regime. Thus, in 1998, Spain first attempted to implement the objectives of Law 54/1997 through Royal Decree 2818/1998. With that Decree, Spain enacted a premium pricing program that applied to electricity generated from facilities in the special regime.[8] However, while Royal Decree 2818/1998 did offer price incentives, those incentives were not adequate to cover the fixed costs of renewable energy production. Moreover, the legislation itself contained no specific duration, and the offered rates were subject to discretional review every four years. The possibility for fluctuation in the incentivized pricing offered by Royal Decree 2818/1998 meant that few investors could rely on it for long-term investments, and few banks were willing to finance investments in costly renewable energy facilities without additional guarantees.

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[6] Royal Decree 2366/1994, of December 9, on electricity generation by hydraulic, cogeneration and other facilities fed by renewable sources.

[7] Law 54/1997, on the Spanish Electricity Sector.

[8] Royal Decree 2818/1998, of 23 December, on electricity generation by renewable facilities, waste and cogeneration.

16. By 2004, Spain was clearly not on track to meet its renewable energy targets. Consequently, it implemented a new feed-in tariff program under Royal Decree 436/2004.[9] That decree was an improvement on earlier incentives programs, because the tariffs its offered would remain in place for a given plant for a fixed period of time. It also stated that subsequent reviews of the program would not apply retroactively to reduce the rates guaranteed to existing facilities. But while Royal Decree 436/2004 contained the legal guarantees that investors needed to feel secure in their investments, the manner in which tariffs were calculated lack sufficient predictability and security for investors.

17. Finally, in 2007, after more than a decade of failed attempts to spawn substantial investment in renewable energy facilities, Spain enacted RD 661/2007. RD 661/2007 was a critical component of Spain's efforts to reduce its dependence on nonrenewable energy sources, improve its pollution rating, and comply with its obligations under European Union and international law. In particular, Spain had undertaken to ensure that, by 2010, 29.4% of its electricity would be generated from renewable energy sources. To achieve that ambitious goal, Spain needed far more private investment in new renewable energy facilities than previous regulatory schemes had generated. In other words, Spain needed a much more robust incentives program, which it implemented in RD 661/2007.

18. RD 661/2007 included target capacities for different types of renewable technologies that Spain hoped to achieve by 2010. For photovoltaic technology, Spain's capacity target was 371 MW. It was 500 MW for solar-thermal facilities; 20,155 MW for wind facilities, 2,400 MW for so-called "mini"-hydro facilities, and more than 1,300 MW for biomass and biogas facilities. To achieve these ambitious goals, RD 661/2007 contained attractive remuneration schemes that made the development, construction, financing, and operation of renewable energy facilities in Spain worthwhile and economically viable.

19. Critically, Spain guaranteed a specific feed-in tariff rate, denominated in euro-cents per kilowatt hour of electricity produced, for the first twenty-five years of a PV plant's operating life. Thereafter, RD 661/2007 guaranteed another feed-in tariff, at a rate approximately 80% lower than the initial rate, throughout the remainder of the plant's operating life.

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[9] Royal Decree 436/2004, of 12 March, which established the methodology for updating and systematizing the legal and economic regime of the production of electricity in the special regime.

20. To track progress toward Spain's target capacity objectives and to monitor the effectiveness and viability of the incentives regime, RD 661/2007 specified that when installed capacity of a given technology reached 85% of the target objective of 371 installed MW, Spain would establish a period of time of at least twelve months for final enrollment of any eligible PV plant into the RD 661/2007 program. All projects registered before the end of that period would benefit from the incentives in RD 661/2007. But after that deadline, the regulatory scheme would be "closed" to new entrants. In other words, Spain designed RD 661/2007 to attract a significant influx of new renewable energy projects to meet certain targets, but Spain tempered that growth by creating a cut-off period that it would announce at least a year in advance, once the program was achieving its intended results.

21. The enrollment period and target capacities were not the only monitoring mechanisms in the RD 661/2007 regime, which also contained provisions for periodic reviews and adjustments to the price incentives. Importantly, however, RD 661/2007 expressly stated that future revisions that Spain might make to the legislation would not apply to facilities already commissioned, operating, and benefiting from the feed-in tariffs granted under it. Specifically, Article 44.3 of RD 661/2007 stated: "The revisions to the regulated tariff … shall not affect facilities for which the deed of commissioning shall have been granted prior to 1 January of the second year following the year in which the revision shall have been performed." In other words, future changes to RD 661/2007's tariffs would not impact already commissioned and operating facilities that had obtained their registration under the regime, or facilities whose construction and commissioning would be completed in the year following the announcement of the revision.

22. To attract the investments it desired in the renewable energy sector, Spain widely promoted the new incentives program in RD 661/2007, both within Spain and abroad. Spain regularly highlighted the principal advantages of RD 661/2007, which included the promises that (i) the new legal framework was stable; (ii) future changes would not apply retroactively to existing plants; and (iii) the incentive tariffs Spain granted under the regime would remain available throughout the operating lives of the facilities enrolled in the program.

23. The official notice on Royal Decree 661/2007 issued by the Council of Ministers[10] and the official press release from the Ministry of Industry, Tourism and Commerce regarding RD 661/2007 were unequivocal, stating that the regime "provides legal certainty for producers, providing stability to the sector and promoting their development" and confirming that future "new rules will not be retroactive."[11] Spain's General Secretary of Energy echoed those sentiments by stating simply that RD 661/2007 provides "total legal certainty."[12]

24. Spain was successful in achieving its goal of encouraging significant investment in renewable energy projects, both to maintain its existing renewable energy capacity and to generate new installed capacity. Thousands of investors with highly diverse backgrounds—including large utility companies, independent renewable energy companies, international and domestic banks, and private equity firms—invested billions of euros in reliance on Spain's guarantees in RD 661/2007, particularly in the photovoltaic sector. By September 27, 2007—only four months after Spain had published RD 661/2007 in its Official Gazette—investment in photovoltaic facilities had reached 85% of the 371 MW capacity target. Thus, as stated in the legislation, on September 29, 2007, Spain established a one-year, final enrollment period, during which all photovoltaic investors who completed the construction and permitting phases of their plants would benefit from the price guarantees in RD 661/2007.

25. Once the enrollment period for new photovoltaic facilities under RD 661/2007 ended in September 2008, Spain raised its photovoltaic capacity target and amended RD 661/2007 with a second incentives regime to further encourage investments specific to the photovoltaic sector. Royal Decree 1578/2008 offered reduced, but still attractive, incentive tariffs to new PV plants that had not obtained their RAIPRE registration by the deadline applicable under RD 661/2007. Importantly, RD 1578/2008 did not eliminate or otherwise affect the application of RD 661/2007 to projects registered under that previous decree. As it

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[10] Official notice dated 25 May 2007 available at http://www.lamoncloa.gob.es/consejodeministros/referencias/Paginas/2007/refc20070525.aspx#RégimenEspecial.

[11] "El Gobierno prima la rentabilidad y la estabilidad en el nuevo Real Decreto de energías renovables y cogeneración. Apuesta gubernamental por las energías limpias y autóctonas," Ministry of Industry, Tourism and Commerce, May 25, 2007, available at http://www.minetur.gob.es/es-ES/GabinetePrensa /NotasPrensa /2007/ Paginas/nprdregimenespecial.aspx.

[12] "Nieto dice que la nueva regulación eólica ofrece 'total seguridad jurídica,'" Cinco Días, May 10, 2007, available at http://cincodias.com/cincodias/2007/05/10/empresas/1178804382_850215.html.

had done with RD 661/2007, Spain also promoted RD 1578/2008, stating that it too would benefit investors by providing predictable future remuneration.

26. RD 1578/2008 established a tariff assignment system for the sale of electricity from photovoltaic sources based on a newly-created Photovoltaic Compensation Pre-Allocation Registry (the "**Pre-Allocation Registry**"). That registry was designed to further monitor the incentives regime and to ensure that the prices offered to investors did not overly burden Spain's electricity system, both with the aim of maintaining investor confidence in the system. Spain imposed capacity limits for subscribing to the Pre-Allocation Registry, which were reported quarterly.

27. Spain assured investors that the pricing available under RD 1578/2008 would be paid to facilities enrolled in the regime for a period of twenty-five years. In absolute terms, the feed-in tariffs Spain established in RD 1578/2008 were somewhat lower than the tariffs it had established in RD 661/2007. Due to declines in the price for photovoltaic facility components such as modules and inverters, however, the incentives under RD 1578/2008 resulted in total project economics that were comparable to the RD 661/2007 tariff regime, and thus, RD 1578/2008 was still adequate to encourage additional foreign and domestic investment in photovoltaic facilities in Spain. Indeed, this drop in component prices had been one of Spain's goals in enacting RD 661/2007. Consequently, the incentives in RD 1578/2008 resulted in further growth in the photovoltaic sector, and the upper limits for registration in the Pre-Allocation Registry for ground-mounted photovoltaic projects were achieved in all annual rounds under the regime.

28. Like RD 661/2007, RD 1578/2008 was successful in achieving Spain's goal of encouraging further significant investment in renewable energy projects. Spain's efforts to encourage renewable energy investments were particularly successful in the photovoltaic sector. In 2001, before Spain had established any meaningful incentives program, Spain's photovoltaic sector had a total installed capacity of less than 5 MW. By 2006, however, the installed capacity slightly exceeded 100 MW, and the reaction to RD 661/2007 in 2007 spurred projections of more than doubling that figure. As it turned out, by the end of 2007, Spain's installed capacity of photovoltaic facilities had reached 690 MW. By 2008, installed capacity increased to well over 3,000 MW, and even after RD 661/2007 had closed to new entrants, Spain continued to promote investment in photovoltaic facilities through RD 1578/2008.

C. Claimant Invested in Reliance on Spain's Incentive Regimes

29. As a result of the long-term tariff guarantees Spain made to investors under RD 661/2007 and then RD 1578/2008, Claimant TREF decided to invest in the Spanish photovoltaic sector.

30. The feed-in tariff guarantees in both RD 661/2007 and RD 1578/2008 were instrumental in Claimant's decision to acquire its investments in Spain. When making those investment decisions, Claimant was confident that Spain would abide by its promises to provide stable financial incentives to photovoltaic facilities registered under RD 661/2007 throughout their operating lives and to photovoltaic plants enrolled under RD 1578/2008 for their first twenty-five years of operation.

31. On the basis of Spain's promises enshrined in those decrees and promoted publicly by high-ranking officials, Claimant invested in Spain beginning in 2008. Claimant acquired projects under RD 661/2007 jointly with other investors, and it purchased one RD 1578/2008 project in its entirety, as described above. Claimant's projects have an aggregate capacity of over 11 MW.

32. As Claimant came to discover, however, and as discussed below, Spain has failed to abide by the clear terms of its own regulatory framework and its promises to investors, first by substantially altering, and then by abrogating, the feed-in tariff regimes that governed Claimant's photovoltaic facilities.

D. Spain Wrongfully Altered the Incentive Regimes

33. Despite the legal guarantees and economic incentives granted in RD 661/2007 and RD 1578/2008, Spain subsequently and retroactively amended the incentives framework for Claimant's photovoltaic facilities, substantially altering the economic regime on which Claimant had based its investments. Spain's amendments to RD 661/2007 and RD 1578/2008 breach the ECT and international law and entitle Claimant to compensation for the damages it has suffered. The measures implemented by Spain and discussed below are illustrative, rather than exhaustive.

34. In 2010, Spain approved at least two pieces of legislation that reduced the remuneration that it had guaranteed to photovoltaic facilities operating under RD 661/2007

and RD 1578/2008. The first of those amendments was Royal Decree 1565/2010,[13] which cancelled the right of projects operating under RD 661/2007 to receive premium pricing after year 25 of their operating lives,[14] despite the clear wording in RD 661/2007 that the projects would be entitled to a specific feed-in tariff rate throughout their operating lives after year 25. That amendment thus reduced the value of four of Claimant's projects in Spain, including Projects GSI, Aznalcollar, Los Cabezos, and Lucentum.

35. Additionally, Royal Decree-Law 14/2010 placed limits on the annual operating hours of photovoltaic facilities that were eligible for incentivized compensation under both RD 661/2007 and RD 1578/2008. That amendment contained two levels of reductions on operating hours for the plants: a general reduction that applied to all photovoltaic facilities indefinitely and an "extraordinary" reduction that applied to facilities operating under RD 661/2007 for a period of three years. While Royal Decree-Law 14/2010 stated that electricity produced beyond the operating hour thresholds could be sold at market prices, those prices were far below the feed-in tariffs that Spain had originally guaranteed. Thus, Royal Decree-Law 14/2010 arbitrarily reduced the quantity of electricity that qualified for the guaranteed feed-in tariff, which further harmed Claimant's investments.

36. The effect of both Royal Decree 1565/2010 and Royal Decree-Law 14/2010 was a substantial reduction in the current and projected revenues and profits that Claimant expected from its photovoltaic projects when it invested in them.

37. On December 27, 2012, Spain enacted a further alteration to the economic regime established in RD 661/2007 and RD 1578/2008. Law 15/2012 reduced the incentives available to Claimant's photovoltaic facilities under RD 661/2007 and RD 1578/2008 through the guise of a so-called "tax on the value of electricity generation."[15] That purported "tax" is calculated at a rate of 7% of all revenue received from the production of electricity, including the incentive remuneration established in RD 661/2007 and RD 1578/2008. Thus, the "tax" does not operate as a tax at all, but instead as a direct reduction in the incentive remuneration promised under RD 661/2007 and RD 1578/2008. All of Claimant's photovoltaic plants have been wrongly subjected to that reduction since January 1, 2013.

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[13] Royal Decree 1565/2010, of November 19, regulating and amending certain aspects related to the activity of generating electricity under the special regime.

[14] That amendment was later extended to year 28 by Royal Decree-Law 14/2010, dated December 23, establishing urgent measures for the correction of the tariff deficit of the electricity sector, and finally to year 30 by Law 2/2011, of March 4, on Sustainable Economy.

[15] Law 15/2012, of December 27, on tax measures for energy sustainability.

38. Furthermore, in February 2013, Spain enacted Royal Decree-Law 2/2013, which retroactively amended the method for updating the incentivized pricing formulas in RD 661/2007 and RD 1578/2008 by de-linking them from the general Consumer Price Index and substituting a lower index.[16] This measure further reduced the remuneration to which Claimant's photovoltaic facilities were entitled and that Claimant reasonably expected when deciding to invest in those facilities in Spain.

39. Each of the measures described above constitutes a wrongful repudiation of Spain's guarantees of stable, incentivized pricing in RD 661/2007 and RD 1578/2008, which should have applied to Claimant's facilities, unmodified, for a period of twenty-five years (under RD 1578/2008) and for the full operating lives of the facilities in the case of RD 661/2007. Spain is liable under the ECT and international law for significantly and retroactively altering RD 661/2007 and RD 1578/2008, thereby failing to fulfill its commitments to Claimant. As discussed below, however, these were not the only violations of the ECT and international law that Spain has committed.[17]

E. Spain Wrongfully Abrogated the Incentive Regimes

40. The foregoing material alterations to the legal and economic regimes guaranteed in RD 661/2007 and RD 1578/2008—in reliance on which Claimant made its investments—caused significant damage to Claimant, principally by reducing the revenues Claimant reasonably expected when it decided to invest in Spain. On July 12, 2013, Spain violated the ECT and international law again through the enactment of Royal Decree-Law 9/2013 ("**RDL 9**")[18] and its subsequent implementing acts.

41. Unlike the measures before it, which reduced the remuneration promised to Claimant's photovoltaic facilities through RD 661/2007 and RD 1578/2008, RDL 9 retroactively abolished the incentivized pricing system previously guaranteed to facilities operating under those Decrees. Instead of paying Claimant's facilities the remuneration promised in RD 661/2007 and RD 1578/2008, Spain declared that it would limit any future compensation to remuneration based on the electricity market price, plus payments of "specific remuneration" designed to provide, in Spain's view, a "reasonable return on the

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[16] Royal Decree-law 2/2013, of February 1, on urgent measures in the electricity system and in the financial sector.

[17] Such violations include but are not limited to breaches of Articles 10 and 13 of the ECT.

[18] Royal Decree-Law 9/2013, of July 12, enacting urgent measures to ensure the financial stability of the electricity system.

investment." RDL 9 did not state exactly how it would calculate those "specific remuneration" payments. Instead, it indicated that it would base the rate of return on the historical yield of ten-year Spanish government bonds and that it would base the amount of investment on its own estimates of the costs and revenues of a "standard" electricity-generating plant built and operated by an "efficient and well-managed company."

42. Some months later, Spain enacted Act 24/2013 of December 26, 2013, on the Electricity Sector ("**Act 24**"), which confirmed the scheme established in RDL 9 and added two significant modifications. First, Act 24 stated that the formula for calculating the specific remuneration payments under RDL 9 would take into account the revenues that a project already had earned when determining whether a given facility had reached Spain's notion of a "reasonable rate of return." Second, Act 24 provided that Spain could further reduce the specific remuneration payments owed under RDL 9 on an annual basis if necessary to balance the electricity system's revenues and expenses.

43. Nearly a full year after first announcing the premature termination of RD 661/2007 and RD 1578/2008, Spain finally issued formulas that served as guidance to what, if any, future remuneration would apply to Claimant's facilities. On June 6, 2014, Spain enacted Royal Decree 413/2014, and on June 16, 2014, Spain enacted Ministerial Order IET/1045/2014 to further implement both RDL 9 and Act 24 and establish specific remuneration parameters for existing facilities.[19] Those acts included over 1500 different formulas, based on over 1500 different "standard facilities."

44. Spain's July 2013 announcement of RDL 9 caused a shock-wave in the Spanish renewables market. Existing and would-be investors alike rightly grew concerned about the future stability of the legal and business environment in Spain, as the legislation created uncertainty regarding the future profits of existing facilities and cast doubt on the credibility of any future legislative promises that Spain might make. RDL 9's implementing measures, the final installment of which was announced in June 2014, only exacerbated the situation by confirming the substantially reduced remuneration that would apply to existing facilities effective as of the July 2013 announcement of the end of the RD 661/2007 and RD 1578/2008 incentives. The new regime was unacceptable both in terms of the returns it ostensibly offered to investments and in terms of its reliability and legitimacy, as Spain could

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[19] Royal Decree 413/2014, of June 6, regulating the activity of electrical power generation by means of renewable energy, cogeneration and waste sources; Order IET/1045/2014, of June 16, approving the remuneration parameters of standard facilities applicable to certain facilities of electrical power generation by means of renewable energy, cogeneration and waste sources.

simply change the rules again the next day. The retroactive application of the new regime, as well as the lack of clarity and utter unfairness of the new legislation, decimated investor confidence in Spain's renewable energy sector.

45. The new remunerative regime now governed by RDL 9; Act 24; Royal Decree 413/2014; and Ministerial Order ETU/130/2017, which replaced Ministerial Order IET/1045/2014 for the period 2017–2020, (the "**New Regulatory Regime**") is extraordinarily complex and its impacts are devastating for the revenues of Claimant's photovoltaic facilities. Spain's notion of a "reasonable rate of return" is to be determined in relation to the historical yield of ten-year Spanish government bonds. Not only has that rate been well below what most investors expected from investments governed by RD 661/2007 and RD 1578/2008, but also as the Spanish economy improves, the yield on ten-year government bonds is decreasing, which will lead to further cuts in remuneration for renewable energy facilities.

46. Further, Spain's "reasonable rate of return" is purely theoretical. When assessing future remuneration, Spain bases its notion of what is reasonable on estimates of the costs and revenues of a "standard" electricity-generating plant built and operated by an "efficient and well-managed company." Those notions are of Spain's own making. In practice, Spain's hypothetical facility is conjured, to the detriment of investors.

47. Furthermore, the new remuneration formulas are set for partial review every three years (the first having occurred based on Ministerial Order ETU/130/2017), and full review every six years (beginning in 2019),[20] subjecting the remuneration of Claimant's plants to further uncertainty despite the original guarantees in RD 661/2007 and RD 1578/2008 that fixed feed-in tariffs for the full operating lives of qualifying projects. Thus, the new framework is virtually assured to lead to further damage to Claimant's investments.

48. Under Spain's dictate, Claimant's facilities receive remuneration at levels far below what Spain promised in RD 661/2007 and RD 1578/2008, which causes significant harm to Claimant. The substantial reduction in remuneration paid to Claimant's facilities continues to cause significant harm to those investments, decreasing their value, jeopardizing their future operation, and leading to cash-flow constraints that will have knock-on effects on Claimant's other business interests.

[20] The only parameters that are not subject to review are the estimated initial investment and the regulatory lifespan of the facility.

49. Claimant seeks relief through arbitration under the ECT for all injuries caused by Spain's illegal measures.

III. THE PARTIES HAVE AGREED TO SETTLE THIS DISPUTE THROUGH SCC ARBITRATION

50. Article 26 of the ECT grants Claimant the right to submit this dispute to international arbitration at the Arbitration Institute of the Stockholm Chamber of Commerce. Article 26 states:

> (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
>
> (2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
>
> (a) to the courts or administrative tribunals of the Contracting Party to the dispute;
>
> (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
>
> (c) in accordance with the following paragraphs of this Article.
>
> (3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.
>
> (b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2) (a) or (b).[21] …
>
> (c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).[22]

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[21] Spain is listed under Annex ID. However, Claimant has not previously submitted this dispute to the courts or administrative tribunals of Spain or in accordance with any previously agreed dispute settlement procedure. Consequently, Article 26(3)(b)(i) is irrelevant for purposes of this arbitration.

[22] Spain is not listed under Annex IA. Consequently, Claimant is entitled to assert a claim based on the last sentence of Article 10(1), the ECT's "umbrella clause," which it does.

> (4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:
>
> > (c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce. …
>
> (6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

51. The requirements under Article 26 of the ECT may be summarized as follows: a) the dispute must concern a breach of Part III of the ECT; b) the dispute must involve a covered "investment;" c) the Respondent must be a Contracting Party to the ECT; and d) the opposing party must be a covered "investor" that is a national or company of "another" Contracting Party to the ECT. Each of these requirements is satisfied in the present case.

A. This Is a Dispute Concerning a Breach of Part III of the ECT

52. As explained in the previous section, this dispute concerns Spain's failure to fulfill legislative and regulatory commitments it made with respect to Claimant's photovoltaic facilities and related investments. The acts and omissions of Spain described above and to be developed further in the course of this proceeding constitute serious and repeated breaches of the protections accorded to Claimant's investments in Spain under Part III of the ECT. Those protections include, but are not limited to, those found in Articles 10 and 13 of the ECT.

53. Article 10 provides a number of guarantees and protections to Claimant and its investments, including: 1) the duty to at all times afford fair and equitable treatment; 2) a requirement that the host state accord "the most constant protection and security" to investments; 3) a prohibition against unreasonable or discriminatory measures that impair the management, maintenance, use, enjoyment, or disposal of investments; 4) a prohibition against treatment less favorable than that required by international law, including treaty obligations; 5) a requirement to observe any obligations the host state has entered into with an investment or an investor; 6) most-favored nation treatment; and 7) national treatment. By way of example only, Spain treated Claimant's investments unfairly and inequitably by altering, and then abrogating, the incentives regimes governing those investments, in violation of its commitments and the clear terms of RD 661/2007 and RD 1578/2008. Spain's misconduct in that respect also unlawfully impaired Claimant's investments in an unreasonable or discriminatory manner. Further, Spain's alteration and then abrogation of the

RD 661/2007 and RD 1578/2008 frameworks violated rights granted to Claimant's PV plants, which amounts to a failure of Spain to fulfill any obligations it has entered into with respect to investments of investors.

54. Additionally, Article 13 of the ECT prohibits Spain from unlawfully expropriating Claimant's investments or subjecting them to measures having an equivalent effect. As Claimant will demonstrate during the course of this proceeding, Spain breached Article 13 of the ECT by, *inter alia*, abrogating the rights granted to its investments through RD 661/2007 and RD 1578/2008. Since those rights, granted by law, formed part of Claimant's investments in this case, Spain's repudiation of those rights constitutes a measure tantamount to expropriation, if not a direct expropriation, under the ECT and international law.

55. Spain's violations of those provisions of the ECT, as well as its violations of international law, involve Claimant's legal rights and entitle it to legal remedies. This is a classic legal dispute.

B. The ECT Covers Claimant's Investments

56. The ECT provides a broad definition of the term "investment." As stated in ECT Article 1(6):

> "Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
>
> (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
>
> (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
>
> (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
>
> (d) Intellectual Property;
>
> (e) Returns;
>
> (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

> A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.
>
> "Investment" refers to any investment associated with an Economic Activity in the Energy Sector.

57. Under this definition, there are a number of different investments of Claimant involved in this case, including, but not limited to: (i) Claimant's ownership of tangible and intangible property and property rights, including its ownership of the photovoltaic projects described herein; (ii) Claimant's ownership of shares and equity participation in Spanish companies and business enterprises as well as debt obligations; (iii) Claimant's right to returns and claims to money; (iv) rights conferred to Claimant's facilities by law, specifically, the rights to fixed feed-in tariff pricing conferred through RD 661/2007 and RD 1578/2008; and (v) rights conferred by licenses and permits.

58. Claimant thus owns several covered "investments" under the ECT.

C. Respondent Is a Contracting Party to the ECT

59. Spain is a Contracting Party to the ECT. Spain signed the ECT on December 17, 1994, and ratified it on December 11, 1997. Spain deposited its instrument of ratification on December 16, 1997. The ECT entered into force for Spain on April 16, 1998.[23]

D. Claimant Is a Covered Investor and a National of a Contracting Party to the ECT

60. Article 1(7) of the ECT likewise provides that the term "investor" means "a company or other organization organized in accordance with the law applicable in that Contracting Party."[24]

61. TREF is a business entity duly established in the Duchy of Luxembourg. It currently owns an interest in the investments related to the photovoltaic facilities in Spain

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[23] *See* Energy Charter: Members and Observers—Spain, C-4; Status of Ratification of the Energy Charter Treaty as of June 2013, C-5.

[24] *See* Energy Charter Treaty and Related Documents, C-1.

discussed above, which it also owned on the date of consent to SCC jurisdiction (discussed below) and immediately before the events giving rise to this dispute.

62. Luxembourg is a Contracting Party to the ECT. Luxembourg signed the ECT on December 17, 1994, and ratified it on February 7, 1997. Luxembourg deposited its instrument of ratification on November 27, 1997. The ECT entered into force for Luxembourg on April 16, 1998.[25]

63. Thus, Claimant is a covered "Investor" and a national of a Contracting Party to the ECT.

E. The Parties Have Consented to Arbitration

64. Spain consented to arbitration under the ECT by signing and ratifying the treaty. As noted above, the ECT entered into force for Spain on April 16, 1998.[26]

65. Claimant consented to arbitrate this dispute pursuant to Article 26 of the ECT in a letter to Spain dated July 16, 2015.[27] Claimant hereby confirms its consent to arbitration under the ECT and submits this dispute to the Arbitration Institute of the Stockholm Chamber of Commerce in accordance with Article 26(4)(c) of the ECT.

F. Claimant Attempted to Settle This Dispute Amicably

66. Before submitting a dispute to arbitration, Article 26 of the ECT states that disputing parties should attempt to settle their disputes amicably, if possible. Claimant sent a letter to Spain on July 16, 2015, which described its various concerns regarding Spain's alterations to the legal and economic regimes applicable to its photovoltaic facilities, notifying it of this dispute and offering to settle the dispute amicably.[28] Spain has not responded to Claimant's offers to pursue a settlement and no resolution of the present dispute has been achieved.

67. Article 26 of the ECT permits an Investor to submit its dispute to arbitration if the dispute is not settled amicably within a three-month period. As more than three months have passed since Claimant attempted to settle this dispute amicably with Spain, it is entitled

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[25] *See* Energy Charter: Members and Observers—Luxembourg, C-6; Status of Ratification of the Energy Charter Treaty as of June 2013, C-5.

[26] *See* Energy Charter: Members and Observers—Spain, C-4.

[27] *See* Triodos SICAV II's Notice Letter to Spain, July 16, 2015, C-7.

[28] *See id.*, C-7.

to submit this Request for Arbitration to the Arbitration Institute of the Stockholm Chamber of Commerce.

IV. PROCEDURAL MATTERS

68. Pursuant to Articles 16 and 17 of the SCC Arbitration Rules, and in view of the size and complexity of this case, the Arbitral Tribunal should consist of three arbitrators.

69. Claimant hereby appoints Oscar Garibaldi, a national of Argentina and the United States, as its party-appointed arbitrator for this proceeding. His contact information is:

809 Wincrest Place
Great Falls, Virginia 22066-2736
United States of America
Tel: +1-202-352-1819
ogaribaldi@garibaldiarbitrator.com
ogaribaldi@outlook.com

70. With respect to the selection of the President of the Arbitral Tribunal, in accordance with Article 17(1) of the SCC Arbitration Rules, Claimant proposes that the President be selected by the two party-appointed arbitrators, with the agreement of the Parties. If Spain fails to appoint an arbitrator or if the two party-appointed arbitrators are unable to agree upon a President, the SCC Board should make the necessary appointment(s) as provided in Article 17(4) of the SCC Arbitration Rules.

71. Claimant chooses English as the procedural language of the arbitration and proposes Stockholm, Sweden, as the seat of arbitration.

72. This Request is submitted by e-mail. Claimant hereby confirms that it has transmitted payment of the SCC registration fee via bank wire (reference "TREF v. Spain").

V. PRELIMINARY REQUEST FOR RELIEF

73. Pursuant to Article 6(iii) of the SCC Arbitration Rules, Claimant requests an award granting it the following relief:

- a declaration that the dispute is within the jurisdiction of the ECT;
- a declaration that Spain has violated Part III of the ECT, including but not limited to Article 10 and Article 13, as well as international law with respect to Claimant's investments;

- compensation to Claimant for all damages it has suffered, to be developed and quantified in the course of this proceeding but likely to include, by way of example and without limitation, sums invested by Claimant to acquire and develop the investments, lost profits, and consequential damages flowing from Spain's breaches;
- all costs of this proceeding, including Claimant's attorneys' fees;
- pre- and post-award compound interest until the date of Spain's final satisfaction of the award; and
- any additional relief the tribunal may deem just and proper.

74. Claimant reserves its rights to modify, amend, or supplement its claims during the course of the arbitration proceeding.

Dated: December 21, 2017

Respectfully submitted,

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